IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ABRAHAM E. HENRY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11315 Trial Court No. 4FA-10-4943 CR MEMORANDUM OPINION No. 6126 — December 10, 2014

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Paul R. Lyle, Judge.

Appearances: Abraham E. Henry, pro se, Kenai, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Following a jury trial, Abraham E. Henry was convicted of first-degree assault for stabbing his sister in the chest.[1] Although Henry was represented by appointed counsel at trial, he waived his right to counsel on appeal and is now proceeding pro se.

In this appeal, Henry challenges his conviction on various grounds, including: (1) his jury was not drawn from a fair cross-section of the community; (2) the trial court erred in failing to hold a *Daubert/Coon* hearing before permitting a state trooper to testify about blood and fat found on a knife Henry used to stab his sister; (3) the prosecutor violated Henry's right to due process by knowingly eliciting false testimony about this knife; (4) Henry's trial counsel was ineffective; (5) his indictment was obtained through false testimony; (6) Henry should not have been prosecuted because his sister did not want him prosecuted; (7) his conviction should be reversed because of issues related to his having been incarcerated out of state; and (8) Henry's prosecution was unlawful under AS 39.05.035 and the Uniform Commercial Code.

For the reasons explained in this decision, we conclude, based on the record before us, that none of these claims has merit. We therefore affirm Henry's conviction for first-degree assault.

Underlying facts

On November 20, 2010, the Alaska State Troopers responded to a 911 call reporting that Virginia Henry had been stabbed in her home. When the troopers arrived at Virginia Henry's home, her brother Abraham Henry emerged from the house holding two knives, telling the troopers to "come and get me." The troopers pursued Henry into the house and eventually placed him under arrest. Henry told the troopers that they

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[1] AS 11.41.200(a)(1).

should have killed him and that "I'm going to prison for life." Henry was charged with first-degree assault.

During Henry's trial, his sister, Virginia Henry, testified that Henry stabbed her while they were arguing about his ex-wife. She also testified that she had forgiven Henry.

The jury heard conflicting testimony regarding the severity of Ms. Henry's injuries. Ms. Henry testified that her injuries were not that severe. However, the troopers who responded to the scene testified that there was a trail of blood leading from Ms. Henry's house to her neighbor's house (where she fled after she was stabbed) and that when they contacted Ms. Henry, she was pale, her breathing was labored, and she was crying out in pain. The neighbor testified that Ms. Henry lost "cups" of blood.

Ms. Henry was transported to the hospital for treatment, although neither party introduced her medical records at trial. Nor did any of the treating physicians testify at trial.

The State did present testimony from Sergeant Jessie Levi Carson who examined one of the knives used in the stabbing and testified that, based on the blood and fat on the knife, he believed eighty percent of the knife had been, at one point in time, inside Ms. Henry. The State also presented evidence from Trooper Keenan Mulvaney that the knife was 8.5 inches long.

At closing, the defense argued that the State failed to prove that Ms. Henry suffered serious physical injury. The prosecutor argued that a stab wound to the chest that resulted in the amount of blood loss demonstrated in this case qualified as serious physical injury.

The jury subsequently convicted Henry of first-degree assault and the court sentenced him to 18 years to serve.

Henry now appeals.

Henry has not shown that his right to be tried by a jury drawn from a fair cross-section of the community was violated

At the start of jury selection, Henry's attorney moved for a new jury panel, noting that the panel appeared "overwhelmingly White ... [a]ll I can see is 100 people and none of them appear to be Native ... ." The trial court denied the motion, and Henry challenges this ruling on appeal, asserting that his right to an impartial jury drawn from a "fair cross-section" of the community was violated.

Under the Sixth Amendment of the United States Constitution[2] and under the Alaska Constitution,[3] a defendant has the right to an impartial jury drawn from a fair cross-section of the community. As the Alaska Supreme Court has stated, "an individual should not be forced, against his will, to stand trial before a jury which has been selected in such a manner as to exclude a significant element of the population of the community in which the crime was allegedly committed."[4]

> To establish a fair cross-section violation, a defendant must show:
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> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[5]

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[2] U.S. Const. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522 (1975).

[3] Alaska Const. Art. I, § 11.

[4] *Alvarado v. State*, 486 P.2d 891, 905 (Alaska 1971).

[5] *Tugatuk v. State*, 626 P.2d 95, 100 (Alaska 1981) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

Henry's crime was committed in Fairbanks. It is not clear whether the number of Alaska Natives in Henry's jury pool was "fair and reasonable" given the Fairbanks community from which it was drawn because we do not know how many Alaska Natives were actually in Henry's jury pool. As noted above, Henry's attorney believed there were no Alaska Natives in the jury pool based on her preliminary visual assessment. But the record indicates that there was at least one Alaska Native in the pool (because the parties later stipulated to his release based on medical issues) and there was never any further inquiry into the racial composition of the jury pool.

Nevertheless, even assuming that Henry was able to show that his jury pool contained a non-representative number of Alaska Natives, there has been no showing that any such underrepresentation was the result of "systematic exclusions" in the Fairbanks jury-selection process.

Henry also argues that his right to an impartial jury was violated because he was not advised that he had a personal right to request a change of venue to a village where, as a rural Alaska Native, he was more likely to be tried by a jury of his peers. But as just explained, the federal and state constitutions guarantee a defendant an impartial jury drawn from a fair cross-section of the community in which the crime occurred (in this case, Fairbanks) — they do not guarantee the defendant his choice of a trial site where the jury is most likely to mirror his cultural or ethnic heritage. Because Henry has failed to show that his right to a fair cross-section of the community was violated, we reject this claim of error.

The trial court did not commit plain error in failing to sua sponte hold a Daubert/Coon hearing before allowing Sergeant Carson to testify that he believed eighty percent of the knife blade had been inside the victim

As noted above, Sergeant Carson testified at trial that one of the knives had blood and fat on eighty percent of its blade and that in his experience — both as a law enforcement officer and as a cook — this was consistent with the conclusion that eighty percent of the blade "was at one time inside of an area that had fat such as a breast or a chest area."

Henry's attorney did not object to this testimony, nor did she ask for a *Daubert/Coon* hearing.[6] On appeal, Henry argues that the superior court committed plain error in failing to *sua sponte* hold a *Daubert/Coon* hearing before admitting this testimony, despite the absence of any defense request.

In a *Daubert/Coon* hearing, the trial court determines whether proposed expert testimony is sufficiently reliable to be admitted. Alaska Rules of Evidence 702 and 703 only require a *Daubert/Coon* hearing before an expert gives "scientific" expert testimony — *i.e.*, expert testimony that is "ground[ed] in the methods and procedures of science."[7] A court is *not* required to hold a *Daubert/Coon* hearing before allowing nonscientific expert testimony, *i.e.*, expert testimony based "on other technical or specialized knowledge."[8]

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[6] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (construing the federal evidence rules governing expert testimony); *State v. Coon*, 974 P.2d 386 (Alaska 1999) (adopting *Daubert* as the proper interpretation of Alaska's rules governing expert testimony).

[7] *Marron v. Stromstad*, 123 P.3d 992, 1006 (Alaska 2005).

[8] *Id.*

Here, Sergeant Carson testified that his conclusion about the blood and fat on the knife was based on his law enforcement experience and training in blood analysis as well as his personal experience as a cook, not on any scientific method. Put another way, Sergeant Carson's testimony indicated that his analysis was based on the sort of "other technical or specialized knowledge" that the Alaska Supreme Court has said does not require a *Daubert/Coon* hearing.[9] Thus, given that there was neither an objection to this testimony nor a request for a *Daubert/Coon* hearing, we conclude that the trial court did not commit plain error in failing to *sua sponte* hold a *Daubert/Coon* hearing before allowing this testimony.

Henry also argues that because the trial court failed to hold a *Daubert/Coon* hearing, he was unfairly denied the right to challenge Sergeant Carson's testimony. But even without a *Daubert/Coon* hearing, Henry's attorney could have hired an expert, or used other means, to counter the reliability and credibility of Sergeant Carson's testimony. Therefore, to the extent Henry believes that the lack of a defense expert unfairly prejudiced his case, he must litigate this issue through a claim of ineffective assistance of counsel in an application for post-conviction relief.[10]

The record provides no support for Henry's claim that the prosecutor knowingly elicited false testimony

Citing *Napue v. Illinois*,[11] Henry also argues that the prosecutor violated his right to due process by eliciting "false testimony" from Sergeant Carson regarding the

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[9] *Id.*

[10] *See Barry v. State*, 675 P.2d 1292, 1295 (Alaska App. 1984) (explaining that because an evidentiary hearing is almost always a prerequisite to an effective assertion of ineffective assistance of counsel, appellate courts are almost never the appropriate forum to raise such a claim).

[11] 360 U.S. 264 (1959).

amount of the knife that was covered in blood and fat. *Napue* stands for the propositions that (1) "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and (2) a conviction must likewise fall "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[12]

Here, there is absolutely nothing in the record to indicate that Carson's testimony was false. Because Henry has failed to establish that Carson's testimony was false, much less that the prosecution presented the false testimony or refused to correct it, *Napue* does not entitle Henry to a new trial.[13]

Henry cannot raise his ineffective assistance of counsel claims on direct appeal

Henry makes a number of claims attacking his trial attorney's performance and asserting that he was denied his Sixth Amendment right to effective assistance of counsel. These claims include: (1) his counsel was ineffective for failing to file a pretrial motion to suppress Sergeant Carson's testimony about the blood and fat on the knife; (2) his counsel's investigation of his case was inadequate; (3) his counsel was ineffective in failing to properly advise him about the State's plea offer; and (4) his counsel failed to confront Debra Stevens (the neighbor whose house Ms. Henry ran to after she was stabbed) with medical records that would have shown that, contrary to Stevens's testimony, Ms. Henry did not lose "cups" of blood.

Our law is clear that absent incontrovertible evidence of attorney incompetence, this Court "require[s] that the question of ineffective assistance of counsel

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[12] *Id.* at 269.

[13] *See Montes v. State*, 669 P.2d 961, 967 (Alaska App. 1983) (finding that the defendant's due process rights were not violated where the State relied on evidence the defendant never proved was false).

be argued first to the trial judge either in a motion for a new trial or an application for post-conviction relief."[14] Because the record on appeal does not establish incontrovertible evidence of any incompetence on the part of Henry's trial counsel, we conclude that these claims must be litigated through an application for post-conviction relief. In those proceedings, Henry will have the opportunity to supplement the record.

Henry has not shown that his indictment should have been dismissed

During the grand jury proceedings, Abraham Ragar, a nurse in the emergency room at Fairbanks Memorial Hospital, testified that Ms. Henry's stab wounds were "deep enough to [give rise to] concern[] for life-threatening injuries." Henry argues that this testimony was false and that, as a consequence, his indictment must be dismissed.

False testimony may require the dismissal of an indictment if it substantially affected the grand jury's decision.[15] But there is no indication that Ragar's testimony before the grand jury was false.[16] Therefore, Henry has not shown that his indictment was obtained through false testimony, or that the indictment should have been dismissed.

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[14] *Barry*, 675 P.2d at 1295.

[15] *McMahan v. State*, 617 P.2d 494, 500 (Alaska 1980).

[16] On appeal, Henry submitted medical records for Virginia Henry to support his claim that Ragar's grand jury testimony was false. However, there is no indication that Henry introduced these records at trial, so we cannot consider them on appeal. *See* Alaska R. App. P. 210(a).

There is no merit to Henry's claim that he should not have been prosecuted because the victim of the assault, his sister, did not want him prosecuted

Henry argues that he should not have been prosecuted because his sister, the victim of the assault, did not want him prosecuted. Victims of crimes have rights — including the right to confer with the prosecution[17] — but these rights do not include the right to prevent a defendant from being prosecuted. "Criminal prosecutions are undertaken in the name of the community, and the executive branch of government (as the representative of the community) has the sole responsibility and authority to initiate and litigate criminal cases."[18] Therefore, the State was not precluded from prosecuting Henry simply because his victim did not wish it.

Henry's claims related to his incarceration out of state

Following his conviction, Henry was apparently incarcerated in Hudson, Colorado for a period of time. He argues that this was a violation of his rights because it prevented his family from visiting him and prevented him from participating in Native ways of life. He also argues that the Colorado prison took a box of legal papers from him and that the prison lacked jurisdiction to restrain him.

These claims are not properly before this Court because they are irrelevant to the question of whether Henry's conviction and sentence should be reversed. An error in transferring a prisoner, or interference with a prisoner's exercise of his legal rights, are not grounds for the reversal of a defendant's conviction or sentence.[19] Henry had the right to challenge these actions administratively.[20] In addition, if the out-of-state prison

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[17] *Cooper v. District Court*, 133 P.3d 692, 700 (Alaska App. 2006).

[18] *Id.* at 710.

[19] *Cf. Brandon v. State*, 938 P.2d 1029, 1031, 1033 (Alaska 1997).

[20] *See, e.g.*, *Clark v. State*, 156 P.3d 384, 386 (Alaska 2007).

interfered with Henry's ability to research his appeal by seizing his legal papers, Henry could have asked for relief in this Court during the preparation of his appellate briefs by, for instance, requesting an extension of time to file his briefs. However, even assuming errors were committed during Henry's incarceration, those errors do not entitle him to reversal of his conviction or sentence.

Henry's claims that his prosecution was unlawful are meritless

Henry asserts that the State lacked the authority to prosecute him because (1) neither the prosecutor nor the judge offered him proof of having received a commission under AS 39.05.035, and (2) he had "invoked United States Uniform Commercial Code 1-207 without prejudice reserved."

Neither claim has merit. Alaska Statute 39.05.035 provides that "[a]fter the appointment of a state officer, the governor shall execute a commission, which states that the person to whom it is issued is appointed and sets out the office to and the term for which the officer is appointed." Alaska Statute 39.05.035 does not impose any duty on a judge or prosecutor to furnish their commission to a defendant, nor does it require that a defendant's conviction be reversed because the judge or the prosecutor did not present documentation indicating that they were, indeed, a judge or a prosecutor.

As for Henry's claim that the Uniform Commercial Code bars his prosecution, the Uniform Commercial Code does not apply in this criminal case.[21]

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[21] *See, e.g.*, *United States v. McKinney*, 375 Fed. Appx. 479, 481-82 (6th Cir. 2010) (collecting cases in which defendants have invoked U.C.C. 1-207 and noting that there is "no plausible claim premised on this section of the Uniform Commercial Code in this criminal case"); *United States v. Cousins*, 2007 WL 2344984, at *2 (W.D. Va. Aug. 14, 2007) (unpublished) ("The Uniform Commercial Code ... simply has no bearing upon this court's jurisdiction with regard to these criminal proceedings"); *United States v. Chester*, 2007 WL 951935, at *4 (D. Nev. Mar. 28, 2007) (unpublished) ("[T]he Uniform Commercial Code does not apply to this criminal case ... ."); *Van Hazel v. Luoma*, 2005 WL 2837356, at *2 (continued...)

Henry's remaining claims are inadequately briefed

To the extent Henry attempts to raise additional claims, those claims are waived because Henry offers no analysis or authority to support them.[22]

Conclusion

We AFFIRM the superior court's judgment.

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[21] (...continued)
(E.D. Mich. Oct. 27, 2005) (unpublished) ("[T]he U.C.C. is inapplicable to criminal proceedings.").

[22] *See Petersen v. Mut. Life Ins. Co. of N.Y.*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in ... a brief, the point will not be considered on appeal.").